CITATION: Cavanaugh v. Grenville Christian College ONSC 290
DIVISIONAL COURT FILE NO.: 130/13
DATE: 20140224

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KITELEY, RADY AND WHITAKER JJ.

BETWEEN:	)	
	)	
LISA CAVANAUGH, ANDREW HALE-BYRNE, RICHARD VAN DUSEN, MARGARET GRANGER and TIM BLACKLOCK	)	*Kirk M. Baert* and *Russell M. Raikes,* for the Plaintiffs (Appellants)
Plaintiffs (Appellants)	)	
– and –	)	
GRENVILLE CHRISTIAN COLLEGE, THE INCORPORATED SYNOD OF THE DIOCESE OF ONTARIO, CHARLES FARNSWORTH, BETTY FARNSWORTH, JUDY HAY THE EXECUTRIX FOR THE ESTATE OF J. ALASTAIR HAIG and MARY HAIG	)	*Geoffrey D. E. Adair, Q.C.*, for the Defendants (Respondents in Appeal), Grenville Christian College, Charles Farnsworth and Judy Hay, the Executrix for the Estate of J. Alastair Haig
Defendants (Respondents in Appeal)	)	
	)	**HEARD at Toronto:** January 13, 2014

RADY J.

Introduction

[1] The appellants appeal from the decision of Perell J. dated May 23, 2012 refusing to certify a class proceeding in which they were the proposed representative plaintiffs. Justice Perell concluded that although the claim disclosed a cause of action against Grenville Christian

College and the individual defendants Mr. Haig and Mr. Farnsworth, an identifiable class existed, there were common issues, and the representative plaintiffs were appropriate, nevertheless a class action was not the preferable procedure.

[2] He also concluded that the claim against the Incorporated Synod of the Diocese of Ontario failed to disclose a cause of action and the action was dismissed against it. An appeal from that decision was dismissed by the Court of Appeal on December 20, 2012.

Background

[3] The appellants are former students of Grenville Christian College, an Anglican boarding school located in Brockville. Mr. Haig and Mr. Farnsworth were ministers of the Diocese and they worked at Grenville.

[4] The appellants allege that they were subjected to various forms of physical and psychological abuse at the hands of Grenville staff, including Farnsworth and Haig. They allege that the abuse was systemic and pervasive. In particular, they plead that "the conduct of the defendants ... was part of a systemic campaign by the defendants, Fathers Haig and Farnsworth and the school to promote and indoctrinate students in the teachings and practices of the Community of Jesus." The Community of Jesus is a Christian organization based in Orleans, Massachusetts, which the appellants characterize as a religious cult whose teachings and practices were intolerant and fanatical.

[5] The plaintiffs seek damages for breach of fiduciary duty, negligence, assault, battery and intentional infliction of mental suffering. The defendants delivered statements of defence in which the allegations are vigorously denied.

The Motions Judge's Reasons

[6] The motions judge concluded that all of the criteria supporting certification were satisfied save one, namely the preferable procedure. He appears to have been doubtful whether common issues existed but ultimately concluded that he was bound to find that there were common issues by virtue of *Rumley v. British Columbia,* [2001] 3 S.C.R. 184; *Cloud et al. v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.); and *Slark (Litigation Guardian of) v. Ontario* (2010), 6 C.P.C. (7th) 168 (Ont. S.C.J.), all cases involving claims of institutional abuse.

[7] In that regard, he made the following observations:

> [129] In the absence of case law authority, I would have agreed with the Defendants that the proposed questions want for commonality, principally because, in my opinion, the resolution of the proposed common issues would not avoid duplication of fact-finding or legal analysis. In other words, assuming success at the common issues trial, when a class member moves on to his or her individual issues trial to prove causation and damages, it would appear that he or she would need and want to repeat much of the evidence and legal analysis about the systemic negligence of the school and its principals in order to succeed in proving causation and damages for his or her personal suffering at the school. But there is authority binding on me that holds that my opinion would be wrong.
>
> [131] Thus, for the purposes of deciding the certification motion, it is not necessary to detail the Defendants' arguments because the Plaintiffs' essential

counterargument is that based on the case law, I have no choice but to certify the proposed questions. I agree with the Plaintiffs' argument.

[8] He reviewed each of the binding authorities and noted the similarities between their allegations and those made in this case. While finding that the common issues criteria bad been met, he foreshadowed that the plaintiffs' reliance on systemic negligence presented "insurmountable problems to them satisfying the preferable procedure criterion."

[9] He continued then to the preferable procedure analysis. He identified the criteria to be considered under this part of the certification test (paras. 145, 146, 147 and 148 of his reasons).

[10] He noted that there was authority for the proposition that a class proceeding will not satisfy the preferability criterion if the common issues are overwhelmed by individual issues. He cited a number of cases, all of which predate *Cloud* and *Slark* and many of which predate or are contemporaries of *Rumley*. He recognized that even if significant individual issues remained after a common issues trial, a class proceeding may still be the preferable procedure.

[11] At paras. 152, 159 and again at 172, he noted that the fact finding and legal analysis would necessarily be duplicated at the individual claims trials. As a result, be determined that this case was distinguishable from *Rumley*, *Cloud* and *Slark* and a class action was not the preferable procedure.

[12] The defendants did not suggest an alternative procedure. As a result, the motions judge concluded at paragraph 151 that the action would remain as a joinder of the five claims and any other plaintiffs would be left to bring their own individual actions. The motions judge directed what he viewed to be a preferable approach similar to one in which he had successfully case

managed a group of individual claims. Those claims began as a proposed class action in a medical malpractice case. Counsel had agreed to the case management procedure of the individual claims and as a result, the class proceeding was discontinued: *Hudson v. Austin,* 2010 ONSC 2789.

[13] The motion for certification was dismissed and the plaintiffs were ordered to pay costs of $300,000 to the defendants, divided equally between the Diocese and the remaining defendants.

The Parties' Positions

[14] The appellants submit as follows:

(i) The motions judge concluded that the preferability criterion was not satisfied by improperly focusing on the allegation of systemic abuse as creating insurmountable hurdles for the plaintiffs. The theory of the case, it is submitted, is for counsel to determine.

(ii) He failed to appreciate the similarities between this case and other institutional abuse cases that had been certified.

(iii) He improperly imposed an alternative procedure without the benefit of submissions from counsel.

[15] The respondents submit that the decision reflects the correct result. They take issue with the conclusion that there are common issues, although no cross appeal was filed. The essence of the respondents' submission is that the individual issues in this case overwhelm any commonality. They say that *Rumley, Cloud* and *Slark* were correctly distinguished for good

reason including the fact that the defendants in those cases were not the actual tortfeasors and duplication of fact finding and legal analysis is inevitable.

The Standard of Review

[16] A finding of fact or of mixed fact and law cannot be reversed absent a palpable and overriding error. Questions of law and principle are reviewable for correctness: *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235. The court should show deference to an experienced class action jurist: *Carom v. Bre-X Minerals Ltd.* [2000] O.J. No. 4014 at para. 36 (C.A.)

Analysis

[17] We have concluded that the appeal must be allowed and the case certified as a class action for two reasons: the motions judge made a palpable and overriding error in the analysis and decision as to the preferable procedure and he made an error of law in imposing an alternative procedure.

[18] At paragraphs 148 and 162, the motions judge correctly listed the criteria to be considered in approaching the preferable procedure analysis. However, he did not undertake the critical analysis that would dictate a different result than that reached in *Rumley, Cloud* and *Slark,* all cases that bear striking similarities to this one, factually and with respect to the legal issues raised. He approached the decision on the preferable procedure on the basis that the common issues would be overwhelmed by the individual issues and did not consider all of the other relevant criteria.

[19] The motions judge did not have the benefit of the recent decision of the Supreme Court of Canada in *AIC Limited v. Fischer*, 2013 SCC 69. In that case, the Court refined the framework for the preferability inquiry. The Court noted the often cited direction that the preferability analysis must be conducted through the lens of the three principal goals of class proceedings, namely, judicial economy, behaviour modification and access to justice. The Court then set out five questions to be answered in determining the access to justice issue as follows:

- what are the barriers to justice?
- what is the potential of the class proceeding to address those barriers?
- what are the alternatives?
- to what extent do the alternatives address the barriers to justice?
- how do the two proceedings compare?

[20] In this case, there is a powerful economic barrier to access to justice. One need only look to the costs order made following the certification motion to understand that "most individuals cannot afford to pursue litigation on this scale": *Seed v. Ontario*, 2012 ONSC 2681.

[21] The resolution of the common issues, including whether systemic abuse existed, would move the litigation forward in a significant way. The process would be streamlined, involving a discreet set of examinations for discovery and documentary disclosure. Any expert testifying on the issue of institutional abuse would testify but once, promoting the goals of access to justice and judicial economy. The risk of inconsistent outcomes would be avoided.

[22] In paragraphs 152, 159 and 172 the motions judge commented that the issues litigated during the common issues trial would necessarily be relitigated in the trials of individual claims.

In our view, this was an error in law and contrary to s. 27 of the *Class Proceedings Act*. A determination of the common issues would necessarily involve a consideration of matters affecting all class members irrespective of their personal circumstances. Those might include:

- the history of the school;
- the duties owed by the respondents to class members particularly relating to discipline;
- the practices and policies, if any, that existed at the school and their impact on those duties;
- any practices or policies that should have been in place to prevent abuse;
- whether certain of the school's alleged disciplinary practices were systemic and a breach of the school's duties to its students.

[23] If so established, there would be no need to repeat the evidence relating to these issues when the individual issues are litigated.

[24] The motions judge seemed to have been influenced by the fact that not every class member suffered the same or indeed any of the abuse alleged by the plaintiffs but nevertheless they would be members of the class if certified. He did not refer to s. 9 of the *Class Proceedings Act*, which permits opting out. This responds as well to those who might object to the case being framed as one of systemic abuse. They have the option of pursuing individual claims on the basis of a different theory of liability.

[25] On the basis of the foregoing, we conclude that the motions judge made a palpable and overriding error in the analysis and decision of the preferable procedure.

[26] Finally, the motions judge imposed a procedure not advocated by the defendants and for which he heard no submissions from either party. The procedure arose in the context of a

factually different case, a medical malpractice claim which had its origins as a proposed class action but which was discontinued after the parties agreed to ask Justice Perell to case manage the proceedings.

[27] This approach is not consistent with the direction given by the Court of Appeal in *Yaiguaje et al. v. Chevron Corporation et al.*, 2013 ONCA 758, which holds that a judge ought not to grant relief for which no request was made and no submissions heard.

[28] For these reasons, the appeal is allowed, the order of May 23, 2012 is set aside, and an order shall issue certifying the action as a class proceeding in the form attached as Schedule I to the appellants' factum.

[29] The parties agreed that costs of the appeal should be fixed at $35,000, payable to the successful party. Therefore, the respondents shall pay to the appellants costs of the appeal in the amount of $35,000. With respect to the costs order below, it is amended so that the respondents shall pay to the appellants costs of the certification motion in the amount of $150,000.

RADY J.

KITELEY J.

WHITAKER J.

Released: February 24, 2014

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BETWEEN:

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Plaintiffs
(Appellants)

– and –

GRENVILLE CHRISTIAN COLLEGE, THE INCORPORATED SYNOD OF THE DIOCESE OF ONTARIO, CHARLES FARNSWORTH, BETTY FARNSWORTH, JUDY HAY THE EXECUTRIX FOR THE ESTATE OF J. ALASTAIR HAIG and MARY HAIG

Defendants
(Respondents in Appeal)

REASONS FOR JUDGMENT

RADY J.

KITELEY J.

WHITTAKER J.

Released: Feb. 24, 2014